INDEX

	Page
Opinions below	2
Jurisdiction	2
Questions presented	3
State and federal statutes involved	4
Statement	4
Specification of errors to be urged	8
Reasons for granting the writ	9
I. Failure on the part of a former attorney of the petitioner to notify her as to a pending motion of dismissal of hearing action deprives her of due process of law	9
II. Section 269.25 and the judgment is in violation of V and XIV Amendments to the Constitution in that they deprive petitioner of property without "due process of law" and "equal protection of the law"	11
Conclusion	14

Citations

Cases:

Baker v. *Humphrey*, 101 U. S. 494, 25 L. Ed. 1065	9
Halhead v. *Ross*, 1 U. S. 405	12
Hill v. *Mendenhall*, 88 U. S. 453, 21 Wall. 453, 22 L. Ed. 616	9
Iowa Cent. Ry. Co. v. *Iowa*, 16 S. Ct. 344, 160 U. S. 389, 40 L. Ed. 467	12
May v. *LeClaire*, 78 U. S. 217, 11 Wall. 217, 20 L. Ed. 50	9
McKegg v. *Crawford*, 1 U. S. 347, 1 L. Ed. 169	12
Osborn v. *Bank of United States*, 22 U. S. 738, 6 L. Ed. 204	9
Overholt v. *Matthews*, 48 App. C. D. 482	13
Rogers v. *Palmer*, 102 U. S. 263, 26 L. Ed. 164	9
Russell v. *Texas Transport & Terminal Co.*, 32 F. 2nd 689	13

Page

Schleif v. *Defnet*, 257 Wis. 170 ..... 2, 9
Schlosser v. *Lesher*, 1 U. S. 251, 1 L. Ed. 123 12
Smith v. *Ayer*, 101 U. S. 320, 25 L. Ed. 955 9
Todd v. *Thompson*, 2 U. S. 105, 1 L. Ed. 309 12
Webb Packing Co. v. *Harmon*, 196 A. 158, 162 12
Wilmington Trust Co. v. *Baldwin*, 195 A. 287, 293 12
Zielenski v. *United States*, 102 F. 2nd 469 13

Statutes:

Wisconsin Statutes:

Sec. 269.25 ..... 2, 3, 4, 12
Article V to the Amendments to the Constitution 2, 4
Article XIV, Section (1) to the Amendments to the Constitution 2, 4

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 431

AGATHA SCHLEIF,

Petitioner,

vs.

MARGARET B. DEFNET, ANNETTE RYAN, ALMA P. ERASMUS, DR. EDGAR J. CRAITE, DR. STEPHAN E. SEBASTIAN, DR. ALBERT F. YOUNG, AND FIDELITY AND CASUALTY COMPANY OF NEW YORK, A CORPORATION,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

To the Honorable, the Justices of the Supreme Court of the United States:

The motion to reinstate said case was brought on before the Court on July 1st, 1949, in which affidavits and arguments were presented and testimony taken, and the Court denied said motion for reinstatement on July 8th, 1949.

The above named petitioner respectfully prays that a Writ of Certiorari be issued to review the decision of the Supreme Court of Wisconsin entered in the above entitled case on the 6th day of June, 1950, motion for re-hearing denied the 6th day of September, 1950.

Opinions Below

The opinion of the Circuit Court for Milwaukee County is reported in the certified record herein (R. 38). The opinion of the Wisconsin Supreme Court (R. 42-44) is reported in 257 Wis. 170.

Jurisdiction

The jurisdiction of this Court is invoked under Article V and Article XIV Section (1) to the Amendments to the Constitution of the United States. In this case the validity of a certain Statute of the State of Wisconsin, to wit: Section 269.25, and a Judgment based on such Statute, is drawn in question upon the ground that such statute and Judgment on its face, and as construed in the opinion and judgment of the Supreme Court of the State of Wisconsin, is repugnant to:

(a) Article V and Article XIV Section (1) of the Amendments to the United States Constitution, in that the Wisconsin Statute deprives the petitioner of liberty and property without due process of law.

(b) That the petitioner was deprived of her "day in Court", and was not given the notice and opportunity to be heard in her cause of action at the time said cause of action was up before the Wisconsin Court for dismissal; and the said Court refused or neglected to note that the petitioner was not properly before the Court; and that the notice of dismissal was faultily served, and that she was not given her constitutional right to object to the dismissal, so that she was deprived of the equal protection of the laws.

The decision of the Wisconsin Supreme Court, the last resort of all cases in the State of Wisconsin, was in favor of the validity of the Statute and Judgment.

The Supreme Court of the State of Wisconsin in its opinion specifically stated, "the fact that the plaintiff had no notice when the dismissal action was heard in 1943, was a proper matter for the court to consider".

Nothing in the record indicates that the Trial Court in 1943 did take notice of the fact that the petitioner was improperly served the Notice of Motion for Dismissal. Thus, the Wisconsin Supreme Court in admitting in its opinion that the Trial Court should have properly considered, whether, or not, the petitioner had notice of the dismissal motion still goes on to conclude that in spite of the fact that the Record herein presented, clearly and sufficiently proves that the petitioner did not have such notice in 1943, or at any time, that her action must be dismissed nevertheless.

The Supreme Court in Wisconsin in effect sanctions the dismissal of this valuable cause of action against this petitioner without notice and places her out of Court without any active fault on her part. She is in effect a victim of a judgment by default against her on the part of her former attorney, who had no right to accept service of the dismissal motion in her behalf. She was deprived of this valuable property without due process of law.

A copy of the entire Record in this case as certified to be true and correct by the Clerk of the Wisconsin Supreme Court is hereby furnished and made a part of this application in compliance with Rule 38, Paragraph (1) of the Rules of this Court.

Questions Presented

1. Whether a State may by Statute (269.25 Wisconsin Statutes 1949) dismiss a cause of action without notice to the plaintiff litigant?

2. Is a litigant deprived of her constitutional rights under

Articles V and XIV to the Amendments of the Constitution of the United States, when an action is dismissed as against her by notice of such dismissal given only to a former attorney, who had been mutually released from the case and who in turn failed to notify the petitioner that the motion for dismissal of her cause of action was pending?

3. Did the Trial Court deny the petitioner "due process of law" by dismissing the action when the record before that Court clearly indicated that the petitioner received no notice of the pending dismissal motion?

State and Federal Statutes Involved

The pertinent state statutory provision that the petitioner is contesting is 269.25, which reads as follows:

> "The Court may without notice dismiss any action or proceeding which is not brought to trial within five years after its commencement."

The pertinent federal provisions contained in Article V and Article XIV to the Amendments of the Constitution of the United States, which this petitioner claims she was denied by virtue of the dismissal of her cause of action without notification are those provisions which protect any person from being deprived of their property "without due process of law" contained in the body of Article V and in section 1 of Article XIV.

Statement

The petitioner commenced her cause of action against the respective respondents on the 17th day of August, 1938, by the service of a Summons. Subsequently on November 16, 1938, the complaint was drawn by Attorney Alfred J. Sapiro and served on the respective parties respondents. The complaint duly verified sets forth in detail a cause of

action for malicious prosecution based on the acts of the respective respondents in causing an application to be filed in the District Court for Milwaukee County to inquire into the sanity of the petitioner and alleges specifically the parts each of the respondents played in causing the commitment of this petitioner to the Hospital for Mental Diseases of Milwaukee County on the 21st day of August, 1936.

The petitioner was detained at such mental institution between the 21st day of August, 1936, and the 11th day of November, 1936. She was released on the order of the District Court Judge, who vacated and set aside the Writ of Commitment and rendered the same null and void. This wrongful commitment caused the most serious repercussions in the petitioner's life, which she has not been able to overcome to date. It has caused a cloud of doubt to be cast against her in all of her every day employment and social contacts, and although she was wrongfully committed in the first instance she has never been able to live down the fact that she had been a patient in a mental institution. She has lost several jobs because of this wrongful commitment up to the present time, and it has seriously affected her family life, particularly the doubts, innuendos, and inferences cast against her only son.

Therefore, this cause of action represents to her the most valuable asset in her life, being an attempt to redeem herself socially and in the eyes of her own family, and it is an ever present struggle until the Court of Law gives her the justice she so eagerly desires.

Subsequent to the service of the Summons and to the service and filing of the complaint, there were notices of retainer submitted by counsel for the various respondents, and other pleadings served. Counsel in behalf of the Fidelity and Casualty Company of New York and Dr. Alfred F. Young, caused to have demurrers served in

behalf of their clients. Counsel in behalf of Alma P. Erasmus, one of the respondents, failed to serve any other pleadings, other than a notice of retainer. Counsel in behalf of Margaret B. Defnet, and Annette Ryan served an Answer as did Counsel in behalf of Dr. Edgar J. Craite and Dr. Stephan E. Sebastian.

Up to August 19, 1940, the petitioner relied entirely upon her attorney, Mr. Sapiro. However, it appeared that the case was not moving along to ultimate trial and there was no disposition of it in any way. Up to that time her attorney did not bring on any motion to argue the demurrers that were filed, nor did he even notice this case for trial, as is necessary under Wisconsin Circuit Court Practice. She then conferred with another attorney, one Harold J. Sanville, whose affidavit appears in the Record herein (R. 29-31), who advised her that until such time that she obtained other counsel she should notify the Clerk of the Circuit Court and give the Clerk her address and any other information, so that she could be duly notified by the Clerk of any matter pending in this case. Being a layman, she depended solely upon the advice of counsel and acted in accordance with counsel's advice.

On August 19, 1940, petitioner obtained a consent of withdrawal from Attorney Sapiro, which was filed and became a part of the record herein (R. 16).

On August 16, 1943 petitioner mailed a letter to the Clerk of Circuit Court, advising the Clerk of her address, said letter also being a part of the record herein (R. 16-17).

On November 24, 1943, counsel for the Fidelity and Casualty Company of New York, and Dr. Albert F. Young served a notice of motion for dismissal on Attorney Sapiro, who as aforestated had been released as petitioner's counsel. Said Attorney Sapiro failed to inform the respondents that he could no longer accept service of any pleadings

on his office and he did not inform the petitioner that such notice for dismissal had been served on his office. This petitioner being without notice, actual or constructive, that her case was going to be dismissed on the 3rd day of December, 1943, and Attorney Sapiro making no appearance for the petitioner, the case was ordered dismissed December 3, 1943, and the order was signed December 23, 1943, by Judge Walter Schinz, Circuit Judge, for Milwaukee County. Nothing appears in the record to indicate that Judge Schinz was cognizant of the fact that Attorney Sapiro was served in error with a notice for motion of dismissal, nor that petitioner herself had any actual or constructive notice. She thereupon, without notice, was deprived of this valuable cause of action and her case was thrown out of court without anyone speaking in her behalf.

When present counsel was retained, a motion to reinstate said case was brought on before the Honorable William F. Shaughnessy, Circuit Judge for Milwaukee County, and affidavits and arguments were presented and testimony taken (R. 34-38). Circuit Court denied said motion for reinstatement on July 8, 1949. No reference was made by Judge Shaughnessy to the argument that she had not been properly notified of the motion for dismissal, nor that her previous counsel had accepted service of such notice of motion for dismissal in error. The case was then brought on for Appeal to the Wisconsin Supreme Court and the Order of the Circuit Court of July 8, 1949, was affirmed. No reference was made by the Wisconsin Supreme Court to the fact and argument that the action had originally been dismissed in error before the Honorable Walter Schinz. On motion for re-hearing new briefs and arguments were presented and the Wisconsin Supreme Court again denied petitioner's request for a re-hearing of this cause.

Specification of Errors to Be Urged

The Supreme Court of the State of Wisconsin erred:

1. In that although the petitioner had no notice when the motion was heard in 1943 and the fact of such lack of notice was a proper matter for the Court to consider, that the Trial Court could dismiss the action in 1943.

2. In holding that when the petitioner brought her motion to reinstate the case in 1949 she was in no better position than if no dismissal had been entered, when the question of reinstatement was the only one for the Court in 1949 to determine on the alleged error of the Court in the 1943 hearing.

3. In holding that she could not rely upon her former Attorney, Mr. Sapiro, when she was misled to her prejudice about the motion for dismissal pending when said Attorney Sapiro failed to inform her, the respondents, or the Court that he no longer represented her, and that the motion for dismissal had been served upon him in error, and that she had been denied by such nonfeasance of Attorney Sapiro, "due process of law" and "equal protection of law".

4. In affirming the Order of the Circuit Court of Milwaukee County directing the denial of the reinstatement of the case under Section 269.25 Wisconsin Statutes, when said Statute is unconstitutional in violation of the V and XIV Amendment of the United States Constitution by permitting dismissal without notice.

Reasons for Granting the Writ

Petitioner prays that the Writ be granted for the following reasons:

I

Failure on the part of a former attorney of the petitioner to notify her as to a pending motion of dismissal of hearing action deprives her of due process of law.

This Court has held in *Baker* v. *Humphrey*, 101 U. S. 494, 25 L. Ed. 1065, that an attorney must promptly advise his client when he has information which it is important that the client should receive. This Court has moreover in several other cases relating to the relations between attorney and client held that there is a presumption that notice to an attorney will also be construed as notice to his client, but this presumption will be overcome when it is proved that the attorney acted without authority. *Hill* v. *Mendenhall*, 88 U. S. 453, 21 Wall 453, 22 L. Ed. 616; *Rogers* v. *Palmer*, 102 U. S. 263, 26 L. Ed. 164; *May* v. *LeClaire*, 78 U. S. 217, 11 Wall 217, 20 L. Ed. 50; *Smith* v. *Ayer*, 101 U. S. 320, 25 L. Ed. 955.

This Court has held in specific language that no person has a right to appear as the attorney of another without the authority of that other. *Osborn* v. *Bank of United States*, 22 U. S. 738, 6 L. Ed. 204. This record clearly indicates that the former attorney of the petitioner accepted service, which in effect was an attempted reinstatement of his appearance in the petitioner's behalf, without her authority, after he had been released. Such action on his part was clearly outside of his scope of authority and definitely prejudiced the rights of the petitioner.

The Supreme Court of Wisconsin on page 173 of 257 Wis. 170 states "the fact that the plaintiff had no notice when the dismissal motion was heard in 1943 was a proper matter for the Court to consider. We cannot see any evi-

dence in the Record that the Trial Court failed to do so." Taking the converse of this logic it can also be stated that since it was a proper matter for Circuit Judge Walter J. Schinz in 1943 to consider whether, or not, the plaintiff was notified of the motion for dismissal, there is still no evidence in the Record that the Judge did take notice of the fact that the plaintiff was not properly served.

In other words, if the Supreme Court held that it was a "proper matter" for the Trial Court to consider whether, or not, the petitioner was properly notified, the fact that the Record shows on its face that she was not properly notified indicates that the Trial Court did not properly consider the Record at the time of the motion in 1943.

If the petitioner was denied her rights in 1943, the denial of those rights was still a miscarriage of Justice in 1949, when the second motion was argued, and, therefore, the point was entirely missed by the presiding judge in that motion for reinstatement. The question before the Court in the hearing in 1949 was not whether this case should have been dismissed at that time for alleged unwarranted delay in bringing it to trial, but whether, or not, the Court erred in dismissing it in 1943. Under the laws and the constitutional guarantees of the State of Wisconsin and of the United States each citizen's right to have him properly brought to Court must be upheld. However, this petitioner's case was not properly disposed of in 1943, and because the matter of notification was violated she did not waive, or forfeit any such right in 1949.

The Wisconsin Supreme Court further stated that since Attorney Sapiro had been her attorney for only two years, between 1938 to 1940, she should not have relied upon him to do anything in her behalf after she had caused him to withdraw from the case. However, the Record unequivocally proves that Attorney Sapiro did do something prejudicial to this petitioner's case after three years of

his withdrawal, by causing and permitting service to be made upon his office, and by such admission of service did cause the dismissal of her cause of action. It is this petitioner's contention that any attorney as an officer of the Court, although he may not technically owe any duty to a client after once he has been released from the case, still owes a duty to the Courts and to the respective defendants, and in fact to a previous client, by informing all concerned of his true and correct status in any case, and that he cannot by nonfeasance disregard any legal matter in which he may have had at one time taken an active part, if such act of disregard did prejudice the rights of his former client, or of any party to the action. With the high degree of responsibility and duty placed upon any member of the bar, it is fallacious to argue that a lawyer should not be obliged to take positive action where such inaction might possibly lead itself to criticism of his professional duty as an officer of the Court and of the Court itself. This petitioner, as any layman, not versed in the technicalities of legal procedure should not be penalized for an overt act taken by her former attorney in admitting service on papers in her behalf without her knowing the consequence of such admission of service.

II

Section 269.25 and the judgment is in violation of V and XIV Amendments to the Constitution in that they deprive petitioner of property without "due process of law" and "equal protection of the law".

The essential elements of due process of law are *notice* and *an opportunity to be heard.* Procedure or legislative acts which deny any citizen such notice, or opportunity, to be heard have been considered as denying litigants due process of law.

The question whether a proceeding is "due process of law", within the meaning of the Constitution is independent of the question, whether it was by a motion or ordinary action, provided the form sanctioned by the State law gives notice and an opportunity to be heard. *Iowa Cent. Ry. Co.* v. *Iowa*, 16 S. Ct. 344, 160 U. S. 389, 40 L. Ed. 467.

Due process of law as applied to proceedings under a Statute resulting in judgment means notice directed by the Statute itself, and not a voluntary or gratuitous notice resting in form of discretion. *U. S. C. A. Const. Amend., 14 Wilmington Trust Co.* v. *Baldwin*, 195 A 287, 293; *Webb Packing Co.* v. *Harmon*, 196 A 158, 162.

Section 269.25 does not meet the requirements of the holding of the latter case. Since notice is ruled out in the Statute it leaves the disposition of the case solely to the discretion of the Court. Thus, the law in itself denies the litigant the fundamental rights under the Constitutional Amendments and where such laws are in conflict with the Constitution they are void laws. If 269.25 is ruled void, the basis of dismissal of this action in 1943 is void and the case must be reinstated. The long and almost limitless line of cases in the federal and state jurisdiction on "due process of law" make it a prerequisite that notice and an opportunity to be heard is essential. In the face of this overwhelming authority Section 269.25 is clearly unconstitutional. Any law, which by its own inherent force extinguishes rights or life, liberty, or property or compels their extinction without any legal notice, comes directly in conflict with the Constitution.

In the early decisions of this Court the dismissal of actions for want of prosecution were not readily encouraged without sufficient reason, or previous neglect being shown. *Schlosser* v. *Lesher*, 1 U. S. 251, 1 L. Ed. 123; *Todd* v. *Thompson*, 2 U. S. 105, 1 L. Ed. 309; *Halhead* v. *Ross*, 1 U. S. 405; *McKegg* v. *Crawford*, 1 U. S. 347, 1 L. Ed. 169. An-

other Federal case, *Overholt* v. *Matthews*, 48 App. D. C. 482, the Court held even a delay of ten years in the prosecution of a suit for fraud, where none of the parties thereto were in any way prejudiced by the delay, should not be dismissed.

In *Russell* v. *Texas Transport & Terminal Co.*, 32 F. 2nd 689, the Court held that a delay of even eight years in prosecuting a suit under the circumstances was not so unreasonable as to justify dismissal. In *Zielenski* v. *United States*, 102 F. 2nd 469, the Court permitted the restoration of an action that had been dismissed, where an attorney for a widow suing on a war risk policy was disbarred by no notice to her to appoint another attorney as required by the New York Statute was given. Thus, the Court held that the placing of the case on the calendar by the Clerk and the dismissal thereof for want of prosecution and without notice to the widow, or any attorney, authorized to represent her as required by Court rule was improper.

All of the foregoing cases show a trend in the Federal Courts to give due consideration to cases brought on for dismissal for want of prosecution, where reasonable and plausible reasons for the delay are presented, and a tendency on the part of the Courts to deny dismissal of such actions, or even to reinstate such actions, even though the delay may be as much as eight to ten years.

This petitioner testified on the motion for reinstatement various reasons why her action was not brought on for trial at an earlier date, among which was the fact that she was a war worker. This and other reasons were not deemed sufficient by either the Trial Court, or the Wisconsin Supreme Court, although in due deference to the petitioner they should have been.

Conclusion

The petitioner submits that she is entitled to a Writ of Certiorari on the basis of the Record in this case, which clearly and unequivocally shows:

(1) That she has suffered an extreme personal loss of a valuable cause of action by the prejudicial act of the acceptance of the admission of service on the notice of motion for dismissal by an attorney, who had no authority to represent her.

(2) By the Trial Court in 1943 failing to recognize and study the Record that she was not properly notified, or represented in Court, when the notice of motion for dismissal was argued, and was, therefore, deprived of her property without due process of law.

(3) By the Supreme Court of Wisconsin failing to reverse the orders of the lower courts dismissing the action in the first instance without notice and in not reinstating the dismissed action in the second instance, and that her constitutional rights were not considered by the appellate court. This case, therefore, is of profound importance not only to this petitioner, who has lost a valuable property right to redeem her character and reputation, but to all citizens of this country generally, who might find themselves in the same, or similar circumstances, having their cases thrown out of court by capricious or negligent acts of counsel, and a failure of Trial Courts to properly study the Record at the time such action for dismissal are brought before them. In view of the fact that such causes of action, such as the one contained herein goes to the very essence of the protection of the rights and dignities of a human being, and is subject to a limited Statute of Limitations for the bringing of such causes of action, makes it doubly important that the rights of such litigant be protected and that his cause be not squandered in vain.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

ALEXANDER LAKES,
Counsel for Petitioner.

ARTHUR W. RICHTER,
Of Counsel.

(1588)

FILED
APR 5 1951
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 431

AGATHA SCHLEIF,

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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INDEX

	Page
Opinion Below	1
Jurisdiction	2
Questions Presented	2
State Statute Involved	2
Statement	3
Argument	5
I. The principal questions presented by the petition have been raised too late for consideration by this Court	5
II. Petitioner's own laches, not any failure on the part of her former attorney, resulted in denial of reinstatement of her action	8
III. Section 269.25 of the Wisconsin Statutes does not deprive a plaintiff of property without due process of law	9
Conclusion	12

CITATIONS

Cases

American Surety Co. v. Baldwin, 287 U. S. 156	5, 12
Boyd v. Stone, 5 Wis. 240	7
Canning v. Hackett, 3 F. Supp. 460	7
Herndon v. Georgia, 295 U. S. 441	5
Hine v. Grant, 119 Wis. 332, 96 N.W. 796	11
Riddlesbarger v. Hartford Ins. Co., 7 Wall. 386	10
Smith v. Carter, 141 Wis. 181, 122 N.W. 1035	11

Page

Waterhouse v. Freeman, 13 Wis. 339 7

Wills v. Shepard, 184 Wis. 26, 198 N.W. 618 9

Wilson v. Cook, 327 U.S. 474 7

Wis. Lumber & Supply Co. v. Dahl, 214 Wis. 137, 252 N.W. 714 11

Wisconsin Statutes

Section 256.27 7

Section 269.25 ..... 2, 5, 6, 7, 10, 11

Section 269.37 7

Constitution

United States Constitution:
Fifth Amendment 2, 5

Fourteenth Amendment 2, 5

IN THE

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the Supreme Court of Wisconsin (R. 42-44) is reported in 257 Wis. 170. The opinion of the Circuit Court for Milwaukee County, Wisconsin, (R. 38) is not reported.

JURISDICTION

The judgment of the Supreme Court of Wisconsin was entered June 6, 1950, (R. 41). A motion by petitioner for rehearing was denied on September 6, 1950, (R. 46). The jurisdiction of this court is sought to be invoked on the grounds that a Wisconsin statute, Section 269.25, is repugnant to Article V and Article XIV (1) of the Amendments to the Constitution of the United States, in that the Wisconsin statute allegedly deprives the petitioner of liberty and property without due process of law.

QUESTIONS PRESENTED

1. Whether a federal question presented initially to the highest state court on petition for rehearing can be considered by this Court where the state court did not entertain or decide the question and where the state court did not give the state statute, under consideration, a new construction in its decision.

2. Whether a State in order to prevent delay and congestion in its judicial system may, by statute, empower courts to without notice, dismiss any action or proceeding which is not brought to trial within five years after its commencement.

STATE STATUTE INVOLVED

Section 269.25 of the Wisconsin Statutes provides as follows:

> "The court may without notice dismiss any action or proceeding which is not brought to trial within five years after its commencement."

STATEMENT

The material facts may be stated briefly as follows:

1. On August 17, 1938, the petitioner commenced an action for malicious prosecution against the respondents herein by service of a summons. (R. 1).

2. A complaint was subsequently drawn by Attorney Alfred J. Sapiro of Milwaukee for petitioner, and served on the respondents in December, 1938. (R. 8).

3. Answers and demurrers of the various respondents were served and filed in December, 1938 and January, 1939. (R. 13-15).

4. Being dissatisfied with the services rendered by her counsel, the petitioner shortly before August 19, 1940, conferred with Attorney Harold J. Sanville of Milwaukee. He advised petitioner that her case had not been noticed for trial (in accordance with the applicable statute) and that there was a five year statute of limitations fixing the time within which the action must be brought to trial or be dismissed and suggested she get other counsel. He further advised her to write the Clerk of Court so as to be informed by him of any development in respect to her case, pending such time as she was deliberating on a choice of a new attorney. (R. 30, 35).

5. On August 19, 1940, on the request of the petitioner, Attorney Sapiro signed a consent of withdrawal as the attorney of record for the petitioner, which consent was filed in the Circuit Court of Milwaukee County, but was not served upon counsel for respondents, nor were they notified of such withdrawal. (R. 16, 32).

6. On October 16, 1943, petitioner wrote the Clerk of the Circuit Court for Milwaukee County advising him of her place of address while she sought new attorneys to take care of the case in court. (R. 16).

7. On December 23, 1943, petitioner's action was ordered and adjudged dismissed by the Circuit Court for Milwaukee County for want of prosecution. The attorneys for respondents, Dr. Albert F. Young and Fidelity and Casualty Company of New York, had brought a motion for dismissal and served notice of motion for dismissal on Attorney Sapiro on November 24, 1943. The motion was argued before the court on December 3, 1943, with no appearance by or on behalf of the petitioner. (R. 17, 18).

8. From August 19, 1940, until January, 1949, petitioner did not employ an attorney to represent her in this action, nor inform the court of her lack of representation. (R. 19, 27, 28, 37).

9. Petitioner claims that during January, 1949, she made the first inquiry so as to discover that her action had been dismissed for want of prosecution on December 23, 1943. (R. 28).

10. On July 1, 1949, a motion to reinstate said action was brought to hearing before the Circuit Court for Milwaukee County, in which affidavits and arguments were presented and testimony of the petitioner and Attorney Sanville taken, dealing with the alleged grounds for relief. Thereupon, the court dismissed said motion, with formal order being entered. (R. 38, 39).

11. Petitioner appealed to the Supreme Court of Wisconsin from the dismissal of her reinstatement motion by the Circuit Court for Milwaukee County contending that she was not properly notified of the earlier motion for dismissal in 1943 and that she should not be penalized for failure of her former attorney to notify her of the existence of that motion for dismissal. No contention was made in the briefs or oral argument of counsel for peti-

tioner that Section 269.25 W. S. was invalid, or unconstitutional. On June 6, 1950, the Supreme Court of Wisconsin affirmed the order of the Circuit Court for Milwaukee County denying reinstatement and held that the lower court did not abuse its discretion in refusing to reinstate petitioner's action. (R. 41-44).

12. Petitioner moved the Supreme Court of Wisconsin for a rehearing of its decision then contending, for the first time, that Section 269.25 W. S. conflicted with Article V and Article XIV of the amendments to the Constitution of the United States. On September 6, 1950, the court denied petitioner's motion without opinion. (R. 46).

ARGUMENT

I.

THE PRINCIPAL QUESTIONS PRESENTED BY THE PETITION HAVE BEEN RAISED TOO LATE FOR CONSIDERATION BY THIS COURT

The petitioner attempts to invoke the jurisdiction of this Court to review the determination of the state court on the ground that Section 269.25 of the Wisconsin Statutes is repugnant to Article V and Article XIV (1) of the Amendments to the Constitution of the United States. It is submitted that this question is presented too late to be heard by his Court because it was belatedly presented to the Supreme Court of Wisconsin on petition for rehearing and that court did not entertain or decide such question, but denied such petition without opinion. Moreover, the Supreme Court of Wisconsin did not give Section 269.25 a new or unanticipated construction in its decision. By a long established general rule, the matter cannot serve as a

basis for review by this Court. *American Surety Co. v. Baldwin,* 287 U. S. 156; *Herndon v. Georgia,* 295 U. S. 441.

Petitioner would have this Court believe that the Supreme Court of Wisconsin based its decision in the case on the validity of Section 269.25. Such is not the fact. It must be remembered that the narrow issue before the Supreme Court of Wisconsin on petitioner's appeal was whether the Circuit Court for Milwaukee County abused its discretion in refusing to reinstate petitioner's action in 1949. (R. 43).

The Supreme Court of Wisconsin pointed out in its opinion that petitioner had commenced her action in 1938; that in 1940 she was informed by Attorney Sanville that her case had not been noticed for trial and would be subject to dismissal if not brought to trial within five years from date of commencement; that when petitioner's action was dismissed in 1943, it already had been pending more than five years; that in 1949 when petitioner made her motion to reinstate, she could be in no better position than if no dismissal had been entered; finally, that if she had a cause of action worth trying, she should have brought it on for trial sometime within the eleven year period. The Supreme Court of Wisconsin then correctly held that the Circuit Court did not abuse its discretion in refusing to reinstate the action. (R. 44).

The decisions of the Supreme Court of Wisconsin and the Circuit Court for Milwaukee County clearly show that they were based upon the fact that petitioner was guilty of laches without excuse or justification. There is no evidence that those decisions were based upon the provisions of the statute whose constitutionality is now assailed.

It should be noted that petitioner did not argue before either of those courts that Section 269.25 was invalid for any reason whatsoever. Her contentions there were that she had not been properly notified of the 1943 motion for dismissal of her action; that her action should not have been dismissed where she intended to rely upon advice of counsel; that she should not be penalized for error committed by her former attorney. Since the record in this case does not show that petitioner presented for decision to the Supreme Court of Wisconsin any federal question, or that that court ruled on the validity of a Wisconsin Statute under the laws and Constitution of the United States, petitioner has no standing before this Court. ***Wilson v. Cook,*** 327 U. S. 474, and cases cited.

Furthermore, service of defendants' notice of motion to dismiss petitioner's action in 1943 was made upon petitioner's attorney, Sapiro, who, so far as the attorneys for the defendants were then aware was, with no contrary information, still petitioner's attorney. It is conceded by petitioner, that defendants' attorneys had not been informed that Attorney Sapiro had ceased to represent the petitioner. The service upon the attorney under the circumstances constituted valid notice to petitioner. ***Boyd v. Stone,*** 5 Wis. 240; Sec. 269.37, Wis. Stats.; Sec. 256.27, Wis. Stats.; ***Waterhouse v. Freeman,*** 13 Wis. 339; ***Canning v. Hackett,*** 3 F. Supp. 460.

Accordingly, petitioner was not affected by the provision of the statute which she now charges to be unconstitutional.

II.

PETITIONER'S OWN LACHES, NOT ANY FAILURE ON THE PART OF HER FORMER ATTORNEY, RESULTED IN DENIAL OF REINSTATEMENT OF HER ACTION

Petitioner further contends that failure on the part of her former attorney, Sapiro, to notify her that he admitted service on defendants' motion for dismissal in 1943 deprived her of property without due process of law. The Supreme Court of Wisconsin said in its opinion on such point:

> "Plaintiff contends that she was misled to her prejudice because she relied upon her attorney, Mr. Sapiro. He had been her attorney for only two years, 1938-1940. Surely she cannot be heard to say that she was relying upon him to do anything in her behalf after she had caused him to withdraw from the case. Furthermore, in 1940, Mr. Sanville had advised her of the need to avoid delay." (R. 43).

Furthermore, petitioner's argument collapses when it becomes apparent that it was her own inexcusable neglect and delay which led to her position of which she now complains. Petitioner commenced her action in August, 1938. Even if her action had not been dismissed in 1943, the fact remains that she waited until the middle of 1949 to ask the court to reinstate her action to entitle it to have a status for trial. From October, 1940 to January, 1949, she delayed procuring counsel to care for her interests in the litigation.

The Supreme Court of Wisconsin, in its opinion, pointed to petitioner's disregard of her responsibility to complete the litigation she had commenced and said: "If she had a cause of action worth trying, she should have

brought it on for trial within eleven years. The court was entitled to consider the additional delay upon her part when determining the motion for reinstatement. She gave no real reason for the delay from 1940 until 1949." (R. 44).

Petitioner further attempts to excuse her delay by designating herself as a war worker. The termination of the war during August, 1945 is well known, yet petitioner made no motion to reinstate her action until July 1, 1949.

Petitioner's own testimony shows her complete lack of diligence in prosecuting her claim. She stated:

> "I was a war worker and was very busy and did not have sufficient time at all hours of the day to spend on choosing counsel. I did shop around for one but I did not feel I had found one I would trust this case in his hands, and of course until I did find a counsel that I thought would be the man to handle it, I notified the Clerk of the Circuit Court; * * *" (R. 37).

Surely the petitioner cannot blame her former attorney for her own laches.

III.

SECTION 269.25 OF THE WISCONSIN STATUTES DOES NOT DEPRIVE A PLAINTIFF OF PROPERTY WITHOUT DUE PROCESS OF LAW

The court in *Wills v. Shepard,* 184 Wis. 26, 198 N.W. 618, said (p. 29):

> "Just as public policy declares that there shall be a limitation as to the time within which actions may be brought, so is it the policy of the law that when an action is brought it shall be prosecuted with some

reasonable degree of expedition. Sec. 2811a,[1] Stats., authorizes the dismissal of an action when it has not been brought to trial within five years after its institution. While this is not a mandatory statute, and it does not fix a hard-and-fast rule, it does rather significantly indicate public policy upon that question. Five years is a generous time within which to permit a plaintiff to bring an action to trial. * * *"

In *Riddlesbarger v. Hartford Ins. Co.*, 7 Wall. 386, 390, this Court, in regard to statutes of limitations, used language applicable to this case:

"* * * They are enacted to restrict the period within which the right, otherwise unlimited, might be asserted. They are founded upon the general experience of mankind, that claims which are valid are not usually allowed to remain neglected. The lapse of years without any attempt to enforce a demand creates, therefore, a presumption against its original validity, or that it has ceased to subsist. This presumption is made by these statutes a positive bar; and they thus become statutes of repose, protecting parties from the prosecution of stale claims, when, by loss of evidence from death of some witnesses, and the imperfect recollection of others, or the destruction of documents, it might be impossible to establish the truth. The policy of these statutes is to encourage promptitude in the prosecution of remedies. * * *"

Surely, a plaintiff who has had five years or more in which to bring her action on for trial cannot with justice claim she has been denied fundamental rights by the provisions of Section 269.25 which allow dismissal of her action without notice. The statute clearly puts a plaintiff on notice that she must proceed to trial within a five year period or be denied the attention of the court for her lack of diligence. The facts of the instant case show that the

[1]Section 269.25 before it was renumbered.

petitioner was aware of Section 269.25 three years before her action was dismissed.

The statute is directory and not mandatory. *Wis. Lumber & Supply Co. v. Dahl,* 214 Wis. 137, 252 N.W. 714. Nor is it an absolute bar to a plaintiff's right to bring her action on for trial. Where the trial court has clearly abused its discretion and arbitrarily dismissed the action, plaintiff is entitled to have the action reinstated. If such reinstatement is denied, plaintiff still may seek redress in the Supreme Court of Wisconsin. If plaintiff can show that she is justly entitled to be relieved from the order of dismissal, that court has power to so direct. *Hine v. Grant,* 119 Wis. 332, 96 N.W. 796. The court there said (p. 336):

> "* * * The statute referred to (Sec. 2811a) was passed to punish the suitor who sleeps away his day in court, and give trial courts a certain and speedy means of clearing the records of mere deadwood, not to turn out of court a suitor who, though ready to proceed seasonably, has consented to delay in order to accommodate opposing counsel, as was shown to be the case here. This proposition seems too plain for extended discussion. The complaint was duly verified, and stated a cause of action. No further showing of merits was necessary. The court abused its discretion in not vacating its order of dismissal."

The Supreme Court of Wisconsin has said that trial courts have inherent powers independent of statute to refuse to aid those who negligently fail to prosecute the actions which they commence. *Smith v. Carter,* 141 Wis. 181, 122 N.W. 1035. In view of such powers vested in trial courts, the provisions of Section 269.25 cannot be considered unreasonable.

The right of appeal from a determination made without prior notice, itself affords the complaining party due

process of law. *American Surety Co. v. Baldwin*, 287 U. S. 156. The review by the Supreme Court of Wisconsin met the requirements of due process.

CONCLUSION

There are no unique and cogent reasons for the review of this case by this Court. The facts show clearly that petitioner was guilty of laches without excuse or justification in the prosecution of her claim. Nothing will be gained in the way of precedent by a review of this case.

Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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